84-1228

NO. _____

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

IN THE ESTATE OF IRVY OKES ROSS,
Deceased

WANDA HOLMES, ANN JONES, JACKIE McGAHAN
and MARY DARNELL, Petitioners

VS.

EDGAR NEWTON ROSS, Independent Executor
of the Estate of IRVY OKES ROSS,
Deceased, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS ELEVENTH SUPREME JUDICIAL DISTRICT

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ATTORNEYS FOR PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the failure to obtain personal service upon interested parties to an Application for Probate of a Will whose names and addresses are known, violates the due process provisions of U.S. Const. Amends V and XIV, Section 1.

2. Whether the availability of a subsequent action to contest the Will cures the constitutional infirmity resulting from failure to give personal notice.

LIST OF NAMES OF PARTIES

The following list is a complete list of all of the parties to the action:

Contestants and Appellants Below, Petitioners Here:

Wanda Holmes, Ann Jones, Jackie McGahan and Mary Darnell.

Proponent and Appellee Below, Respondent Here:

Edgar Newton Ross, Independent Executor of the Estate of Irvy Okes Ross, Deceased.

The following list is a complete list of all of the attorneys to the action:

Attorneys for Contestants and Appellants Below, Petitioners Here:

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO. _____

IN THE ESTATE OF IRVY OKES ROSS,
Deceased

WANDA HOLMES, ANN JONES, JACKIE McGAHAN
and MARY DARNELL, Petitioners

VS.

EDGAR NEWTON ROSS, Independent Executor
Estate of IRVY OKES ROSS,
Deceased, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS ELEVENTH SUPREME JUDICIAL DISTRICT

The Petitioners, WANDA HOLMES, ANN JONES, JACKIE McGAHAN and MARY DARNELL, respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the Court of Appeals of Texas, Eleventh Supreme Judicial District, entered June 7, 1984.

OPINIONS OR REPORTS DELIVERED IN THE COURTS BELOW

The Supreme Court of Texas, on September 19, 1984, in its Cause No. C-3278, refused an Application for Writ of Error with the notation "no reversible error" (App., infra, p. 13a) and subsequently overruled Petitioners' Motion for Rehearing on October 31, 1984 (App., infra, p. 14a) without a reported Opinion.

The Opinion of the Court of Appeals of Texas, Eleventh Supreme Judicial District, (App., infra, pp. 1a-12a), is reported at 672 S.W.2d 315.

There was no formal Opinion of the District Court. The denial of the Motion to Set Aside and for New Trial was overruled by operation of law, but the Court did file Findings of Fact and Conclusions of Law (App., infra, pp. 15a-19a).

There was no formal Opinion of the County Court of Eastland County, Texas.

The Court's Order to transfer the Motion to Set Aside and for New Trial to the District Court and the Order Admitting Will to Probate and Appointing Independent Executor appear herein in Appendix, pp. 20a-21a and pp. 22a-25a, respectively.

JURISDICTION OF THIS COURT

The Judgment of the Court of Appeals of Texas, Eleventh Supreme Judicial District, was entered on June 7, 1984 (App., infra, pp. 12-a). The Supreme Court of the State of Texas refused the Application for Writ of Error with the notation "no reversible error" (App., infra, p. 13a) on September 19, 1984. The Supreme Court overruled the Motion for Rehearing of the Application for Writ of Error (App, infra, p. 14a) on October 31, 1984. The jurisdiction of this Court is

invoked under 28 U.S.C. §1257(c), relating to a right set up and claimed under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTIONAL PROVISIONS:

U.S. Const. Amend V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend XIV, Section 1, provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TEXAS PROBATE STATUTES:

Tex. Prob. Code Ann., §33(f)(2) (Vernon 1980) provides:

> **Posting.** When citation or notice is required to be posted, it shall be posted by the sheriff or constable at the courthouse door of the county in which the proceedings are pending, or at the place in or near the courthouse where public notices customarily are posted, for not less than ten (10) days before the return day thereof, exclusive of the date of posting. The clerk shall deliver the original and a copy

> of such citation or notice to the sheriff or any constable of the proper county, who shall post said copy as herein prescribed and return the original to the clerk, stating in a written return thereon the time when and the place where he posted such copy. The date of posting shall be the date of service. When posting of notice by a personal representative is authorized or required, the method herein prescribed shall be followed, such notices to be issued in the name of the representative, addressed and delivered to, posted and returned by, the proper officer, and filed with the clerk.

Tex. Prob. Code Ann., §93 (Vernon 1980) provides:

> After a will has been admitted to probate, any interested person may institute suit in the proper court to contest the validity thereof, within two years after such will shall have been admitted to probate, and not afterward, except that any interested person may institute suit in the proper court to cancel a will for forgery or other fraud within two years after the

discovry of such forgery or fraud, and not afterward. Provided, however, that persons non compos mentis and minors shall have two years after the removal of their respective disabilities within which to institute such contest.

Tex. Prob. Code Ann., §128(a) (Vernon 1980)

provides:

> **Where Application Is for Probate of a Written Will Produced in Court or for Letters of Administration.** When an application for the probate of a written will produced in court, or for letters of administration, is filed with the clerk, he shall issue a citation to all parties interested in such estate, which citation shall be served by posting and shall state:
>
> (1) That such application has been filed, and the nature of it.
>
> (2) The name of the deceased and of the applicant.
>
> (3) The time when such application will be acted upon.

(4) That all persons interested in the estate should appear at the time named therein and contest said application, should they desire to do so.

STATEMENT OF THE CASE

This is an appeal from a Judgment by the Court of Appeals of Texas, Eleventh Supreme Judicial District, affirming the District Court in overruling a Motion for New Trial and to Set Aside Order Admitting Will to Probate and Appointing Independent Executor. The Supreme Court of the State of Texas denied an Application for Writ of Error and overruled a subsequent, but timely, Motion for Rehearing on same.

IRVY OKES ROSS, Decedent, died July 13, 1983, in a hospital following a lengthy hospital stay for lung cancer. During such hospital stay, he was treated regularly for

pain with heavy narcotics. Prior to entering the hospital, Decedent had executed and had in force and effect a Last Will and Testament, leaving all of his estate equally to five (5) children, WANDA HOLMES, ANN JONES, JACKIE McGAHAN, MARY DARNELL and EDGAR NEWTON ROSS. Prior to the execution of Decedent's subsequent Will, EDGAR NEWTON ROSS moved into Decedent's house and lived there to the exclusion of Petitioners from March until the date of Decedent's death.

Twenty-six (26) days before his death, Decedent executed another Will on June 17, 1983, specifically disinheriting his four (4) daughters and leaving his entire estate to his son, EDGAR NEWTON ROSS, as well as appointing his son Independent Executor. Upon the preparation of the subsequent Will, EDGAR NEWTON ROSS picked up such Will

from the attorney's office, delivered it to his father at the hospital, solicited witnesses and a notary for the execution of the Will without informing them as to what they were signing, and conducted the execution of the Will.

On July 14, 1983, the day following Decedent's death, EDGAR NEWTON ROSS filed an Application to Probate Will and Appoint Independent Executor, in the County Court of Eastland County, Texas, and gave notice of such Application by posting at the Eastland County Courthouse door, a copy of such Application as provided by Tex. Prob. Code Ann. §128(a) and §33 (Vernon 1980). None of Decedent's daughters reside within four hundred (400) miles of Eastland County, Texas; two live in Colorado, one lives in Houston, Texas, and one lives in Liverpool, Texas. It is undisputed that

EDGAR NEWTON ROSS knew the names and addresses of his sisters, Decedent's daughters, and that he made no attempt to notify them that he had filed the Application for Probate other than by posting as set forth above.

The citation posted at the Eastland County Courthouse door stated that the Application would be acted upon on July 28, 1983. Jim Holmes, husband of Petitioner, WANDA HOLMES, inquired of EDGAR NEWTON ROSS regarding the Will on the date of his IRVY OKES ROSS' funeral, July 17, 1983. In response, EDGAR NEWTON ROSS informed Jim Holmes that the Will was in the hands of the State and that Petitioners would be notified within ten (10) days to two (2) weeks. At such time, EDGAR NEWTON ROSS had already filed the Application for Probate

and a hearing date had been set, but specifically withheld such information from Petitioners.

EDGAR NEWTON ROSS testified on cross-examination that he knew his sisters were interested in the Will because they had asked about it, that he knew an Application for Probate of the Will had been filed, but that he did not inform any of them that a hearing would be held on July 28, 1984, regarding the Will. He further testified that he knew his sisters would not be likely to see a citation posted in Eastland, Eastland County, Texas, because they lived in Colorado and other parts of Texas, and that they would not know that they needed to make an appearance on or before July 28, 1983, if they wished to contest the probate of the Will.

The County Court's Order Admitting the Will to Probate and Appointing an Independent Executor was signed on July 28, 1983. Petitioners filed a timely Motion to Set Aside and for New Trial on August 19, 1983, and thereafter timely amended such Motion and filed the Amended Motion on August 25, 1983. Such Motion and proceedings were transferred, pursuant to the Texas Probate Code, from the County Court to the 91st Judicial District Court of Eastland County, Texas (App., infra, pp. 20a-21a).

In the Motion to Set Aside and for New Trial, and at the hearing on same held October 6, 1983, Petitioners raised the issue relating to the failure to give personal notice to the sisters and the constitutionality of such lack of personal notice (Tr 21 and SF 68). The Motion to Set Aside

and for New Trial was overruled by operation of law on October 11, 1983. On November 14, 1983, the 91st Judicial District Court filed its Findings of Fact and Conclusions of Law (Tr. 67; App., infra, pp. 15a-19a). Finding of Fact No. 3 states in pertinent part:

> "On July 28, 1983, the County Court found as follows:
>
> (a) That every citation required by law had been duly issued, served and returned in the manner and for the length of time required by law..."

Conclusion of Law No. 2 states:

> The method of citation by posting provided for in §§128 and 33 of the Probate Code is constitutional.

However, neither of these Findings or Conclusions are material, ultimate or controlling, since the issue raised was not the constitutionality of §§128 and 33 of

the Probate Code. The controlling issue in the Trial Court, and on appeal, is whether or not Petitioners were afforded the minimum requirements of due process guaranteed under the United States Constitution. In this regard, the District Court specifically failed and refused to make any Finding relating to Petitioners' receipt of notice of the hearing on the Application to Probate Will and Appoint Independent Executor, and their opportunity to be present and to present their objections. Petitioners requested additional Finding of Fact No. 15, which was submitted to the District Court but was not found either in the affirmative or the negative by the Trial Court. Finding of Fact No. 15 states:

> Evidence exists that Movants had no actual knowledge of the Application to Probate Will and

> Appoint Independent Executor filed by EDGAR NEWTON ROSS until after July 28, 1983, the date of the County Court's Order Probating Will and Appointing Independent Executor.

(Tr 70).

In appealing the Trial Court's Judgment, Petitioners, in the Brief to the Court of Appeals of Texas, Eleventh Supreme Judicial District, raised in the assignment of Points of Error, and specifically discussed in the Argument and Authorities portion of the Brief, the following Point of Error No. 5:

> "The Trial Court erred in failing to grant Movants' First Amended Motion to Set Aside and for New Trial because Movants were denied due process of law under Amendments V and XIV of the United States Constitution in that they did not receive personal service of citation notifying them of the probate proceedings in the County Court of Eastland County, Texas."

The Court of Appeals in its Opinion (App. A, infra, pp. 1a-12a) considered, discussed and denied the foregoing claim by Petitioners as to the due process right under the United States Constitution. In suport of said denial, the Court stated:

> "The Order Admitting the Will to Probate is not such a final determination of its validity as to deny Appellants a remedy. Even though the burden of proof shifts to Appellants, they may contest the validity of the probated Will by initiating a proceeding under Tex. Prob. Code Ann. §93 (Vernon 1980). We hold that Appellee's failure to obtain personal service upon Appellants does not violate the due process provision of the Federal Constitution."

In the Application for Writ of Error to the Supreme Court of Texas, Petitioners raised in their Points of Error, and specifically discussed in the Arguments and Authorities portion of the Application for

Writ of Error, the following Point of Error No. 5:

> "The Trial Court and Court of Appeals erred in finding that the failure to obtain personal service upon Appellants did not violate the due process provisions of U.S. Constitution Amendments V and XIV, Section 1."

The Supreme Court of Texas refused the Application for Writ of Error, with the notation "no reversible error," (App., infra, p. 13a). Petitioners' Motion for Rehearing contains the following Point of Error No. 2:

> "This Court erred in not granting the Application for Writ of Error upon Point of Error No. 5 which reads:
>
> 'The Trial Court and Court of Appeals erred in finding that failure to obtain personal service upon Appellants did not violate the due process provisions of the United States Constitution, Amends V and XIV, Section 1.'"

The Supreme Court of Texas subsequently overruled Petitioners' Motion for Rehearing (App., infra, p. 14a).

Accordingly, Petitioners seek by Writ of Certiorari, review by the United States Supreme Court of the Decree rendered in the Court of Appeals and Supreme Court of the State of Texas, the highest court of Texas, pursuant to 28 U.S.C. §1257(3) of their right to due process provided in U.S. Constitution Amendments V and XIV, Section 1.

REASONS FOR GRANTING THE PETITION

1. This case involves the issue as to the due process requirements in providing notice to interested parties to a proceeding whose names and addresses are known. Petitioners, as the daughters of

Decedent, were interested parties to the probate of the Will of their father. Moreover, the probate proceedings affected their property interest in the Estate by specifically taking away from them what had been provided to them in a prior Will. However, the only notice given Petitioners of the filing of their father's Will for probate was by posting at the Eastland County Courthouse door in compliance with Tex. Prob. Code Ann. §128(a) (Vernon 1980).

The United States Supreme Court has held, however, that providing notice in strict compliance with statutory requirements is not necessarily adequate to afford due process. In the case of missing persons and those whose names or residences are unknown, notice by posting or by publication is all that is required. However,

when the names and addresses of interested parties are known, this Court has stated:

> "As to known present beneficiaries of known place of residence, however, notice by publication stands on a different footing. Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties. Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency."

Mullane vs. Central Hannover Bank & Trust Company, 339 U.S. 306, at 318, 70 S.Ct. 652, 94 L.Ed. 865, at 875 (1949).

There have been no United States Supreme Court cases relating to notice in accordance with due process in relation to probate proceedings since 1949. The most closely analogous case is Armstrong vs.

Manzo, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965). In Armstrong vs. Manzo, supra, a divorced mother and her new husband, seeking adoption of a child from the wife's first marriage, followed the procedure as provided by Texas law. Under the circumstances alleged, i.e., the natural father's failure to contribute to the child's support for two (2) years, Texas Statutes did not require notice to the natural father. Accordingly, the Manzos did not to give notice to the father of the pendency of the adoption proceedings, although they knew his precise whereabouts in Texas. Following entry of the Court's Adoption Decree terminating the natural father's relationship and rights with his child, the natural father learned of the proceedings and promptly filed a Motion to Set Aside the Decree and for New Trial. In

such case the United States Supreme Court, following the reasoning in Mullane, supra stated:

> "It is clear that failure to give the Petitioner notice of the pending adoption proceedings violated the most rudimentary demands of due process of law. Many controversies have raised about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

Armstrong vs. Manzo, 380 U.S. 545, at 549, 85 S.Ct. 1187, 14 L.Ed.2d 62, at 65 (1965). (Citations omitted)

It is without dispute that EDGAR NEWTON ROSS knew the addresses of the residences of his four (4) sisters. In addition, he had the opportunity to personally advise his sisters of the pendency of the probate proceedings on the date of the funeral since the Application for Probate had already been filed. Instead, EDGAR NEWTON ROSS and his attorney chose to rely upon notice by posting in Eastland County, Texas, to apprise Petitioners, who did not reside near Eastland County, Texas. The Application for Probate of the Will certainly involved a proceeding in which Petitioners would be deprived of property rights in their father's estate; hence, notice and hearing must measure up to the standards of due process. As discussed in Mullane vs. Central Hannover Bank & Trust Company, supra, where the names and post

office addresses of those affected by a proceeding are known, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency. This is true even if the applicable statute does not require personal notice. Had EDGAR NEWTON ROSS or his attorney mailed copies, by ordinary mail, of the Application for Probate, together with the notices as to the time and date of the probate hearing, to Petitioners herein, they would have afforded Petitioners the minimum due process required by the Constitution. This would have allowed Petitioners to object to the subsequent Will at a time when the burden of proving its validity was on Respondent, EDGAR NEWTON ROSS. However, the failure to provide this notice violated the most rudimentary demands of due process

of law. Consequently, Petitioners' only remaining remedy to contest the Will requires them to overcome the burden of proving its invalidity.

2. The Texas Court of Appeals recognized, in the case at bar, the rule relating to notice in compliance with due process, but affirmed the Trial Court's overruling of a Motion to Set Aside and for New Trial because of the availability of a subsequent probate suit to contest the Will. However, just as in the subsequent hearing afforded the father in Armstrong, supra, the burden of proof shifts. In a subsequent probate suit, pursuant to Tex. Prob. Code Ann. §93, the burden of proof would shift from the proponent of the Will, EDGAR NEWTON ROSS, to the opponents of the Will, Petitioners. Croucher vs. Croucher, 660 S.W.2d 55 (Tex., 1983).

In stating its disagreement with the Texas Court of Civil Appeals that a subsequent hearing cured any constitutional infirmity in the notice, the United States Supreme Court stated:

> "Had the Petitioner been given the timely notice which the Constitution requires, the Manzos, as the moving parties, would have had the burden of proving their case as against whatever defenses the Petitioner might have interposed. . . .
>
> "Instead, the Petitioner was faced on his first appearance in the courtroom with the task of overcoming an adverse Decree entered. . . Yet, these burdens would not have been imposed upon him had he been given timely notice in accord with the Constitution."

Armstrong vs. Manzo, 380 U.S. 545, at 551, 14 L.Ed.2d 62, at 66, 85 S.Ct. 1187 (1965).

Since the burden of proving that the Will is valid shifts from EDGAR NEWTON ROSS

at the hearing on the Application for Probate of the Will, to the Petitioners to prove the invalidity of same in a subsequent suit to contest the Will, pursuant to Tex. Prob. Code Ann. §93, the "opportunity to be heard" at a meaningful time and in a meaningful manner to comply with the requirements of due process could only be given by the Trial Court's granting of the Motion to Set Aside and for New Trial.

Only by granting such Motion would Petitioners be in the same position as they would have occupied had they originally received the proper notice in accordance with due process.

In regard to the Court of Appeals in the case at bar stating that "the Order admitting the Will to probate is not such a final determination of its invalidity as to

deny Appellants a remedy," Petitioners would show that to the contrary, such an Order has been specifically found to be final by the Texas Courts. Estate of Wright, 676 S.W.2d 161 (Tex. App. - Corpus Christi, 1984, no writ); Cherry vs. Reed, 512 S.W.2d 705 (Tex. Civ. App. - Houston [1st Dist.] 1974, writ ref'd, n.r.e.). In Estate of Wright, supra, at 163, the Court stated:

> "A probate order or judgment is final if it finally disposes of and is conclusive of the issue or controverted question for which that particular part of the proceeding was brought. . . A probate order or judgment may be final and appealable even though the decision does not fully and finally dispose of the entire probate proceeding."

Further, there is no dispute that while Petitioners do have the option to file a new and independent suit pursuant to

Tex. Prob. Code Ann. §93, they will be required to face on their first appearance in the courtroom the task of overcoming an adverse decree entered. Yet, these burdens would not have been imposed upon them had they been given timely notice in accord with the Constitution. Therefore, the Order in the proceeding where the burden of proof is still on Respondent, EDGAR NEWTON ROSS, is final if Petitioners are not granted a new trial. The existence of the option to file a separate suit to contest the Will does not effect the finality of the prior Order.

Petitioners, by this Petition, are seeking to have the United States Supreme Court follow its prior decisions applying the due process clause of the Constitution regarding notice to interested parties of

proceedings, and to include in such application probate proceedings where the names and addresses of interested parties are known. A clarification is obviously needed as to whether or not identifiable persons denied property rights by probate proceedings are entitled to the most rudimentary requirements of due process.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS

*Counsel of record

January, 1985

A P P E N D I X

In the Estate of Irvy Okes Ross, Deceased

No. 11-83-250-CV --
Appeal from Eastland County

Our former opinion and judgment dated April 26, 1984, are withdrawn and our opinion and judgment dated June 7, 1984, are substituted therefor.

RALEIGH BROWN

ASSOCIATE JUSTICE

June 7, 1984

Not published. See TEX. R.CIV.P. 452.

In the Estate of Irvy Okes Ross, Deceased

No. 11-83-250-CV --
Appeal from Eastland County

This is an appeal from the denial of a motion to set aside an order admitting a will to probate and for new trial. Wanda Holmes, Ann Jones, Jackie McGahan and Mary Darnell, the four daughters of decedent Irvy Okes Ross, sought to set aside the order probating the will of Irvy Okes Ross and appointing Edgar Newton Ross, the decedent's son, independent executor.

Irvy Okes Ross died on July 13, 1983, following a lengthly illness. While in the hospital, Ross executed a new will specifically disinheriting his four daughters and leaving everything to his son, as well as appointing his son independent executor.

On July 14, 1983, appellee gave notice by posting at the Eastland County Courthouse, as provided by TEX. PROB. CODE ANN. sec. 128(a) (Vernon 1980), of his application to probate will and appoint independent executor. None of the daughters reside in Eastland County. The son provided no other notice of the application for probate. The record does not reflect that he attempted to notify his sisters of such filing.

The County Court's order probating the will and appointing an independent executor was signed on July 28, 1983. The daughters timely filed their motion to set aside the order and for a new trial. A hearing on the motion was held in the District Court, and the motion was overruled by operation of law. The daughters appeal the overruling of their motion to set aside and for new trial. We affirm.

Appellants urge that TEX. PROB. CODE ANN. sec. 128 (Vernon 1980), implemented in accordance with TEX. PROB. CODE ANN. sec. 33 (Vernon 1980), which relates to providing notice, is unconstitutional. The Attorney General must be served with a copy of the proceedings, and is entitled to be heard when a litigant alleges and seeks a declaration that a statute is unconstitutional. TEX.REV.CIV.STAT.ANN. art 2524-1, sec. 11 (Vernon 1965); Commerce Independent School District v. Hampton, 577 S.W.2d 740 (Tex.Civ.App. - Eastland 1979, no writ); Commissioners Court of Harris County v. Peoples National Utility Company, 538 S.W.2d (Tex.Civ.App. - Houston [14th Dist.] 1976, writ ref'd n.r.e.). The record does not reflect the prerequisite service on the Attorney General. The point of error is overruled.

Next, appellants contend that appellee's failure to obtain personal service on them violates the due process provisions of the federal constitution. They rely upon Mullane v. Central Hanover Bank and Trust Company, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, 873 (1949), in which the United States Supreme Court stated:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections....The notice must be of such nature as reasonably to convey the required information,...and it must afford a reasonable time for those interested to make their appearance. (Citations omitted) (Emphasis ours)

Appellants urge that statutory notice by posting or publication does not satisfy

the due process requirements of the federal constitution in circumstances where the name and addresses of interested parties are known or available.

We recognize that various federal and Texas courts have upheld this argument based upon the reasoning in Mullane, supra. Armstrong v. Manzo, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965); City of Houston v. Fore, 412 S.W.2d 35 (Tex.1967); City of Waco v. Roddey, 613 S.W.2d 360 (Tex.Civ. App. - El Paso 1978, writ ref'd n.r.e.); City of Houston v. Parkinson, 419 S.W.2d 900 (Tex.Civ.App. - Houston [1st Dist.] 1967, writ ref'd n.r.e.). None of these cases, however, involved probate matters. Texas courts hold that posting notice of the application for probate, when a will has been produced for the court, is suf-

ficient without giving personal notice. Ladehoff v. Ladehoff, 436 S.W.2d 334 (Tex.1968); Nass v. Nass, 228 S.W.2d 130 (Tex.1950); Fortinberry v. Fortinberry, 326 S.W.2d 717 (Tex.Civ.App. - Waco 1959, writ ref'd n.r.e.). The order admitting the will to probate is not such a final determination of its validity as to deny appellants a remedy. Even though the burden of proof shifts to appellants, they may contest the validity of the probated will by initiating a proceeding under TEX. PROB. CODE ANN. sec. 93 (Vernon 1980). We hold that appellee's failure to obtain personal service upon appellants does not violate the due process provision of the federal constitution.

In two points of error appellants contend that the trial court erred and abused

its discretion in failing to grant movants' first amended motion to set aside the order of probate and for a new trial. They argue that the great weight and preponderance of evidence shows that: (1) movants' failure to answer was neither intentional nor the result of conscious indifference; (2) movants' failure to answer was due to a mistake or accident; (3) movants' motion sets up a meritorious defense; and (4) movants' motion was filed at a time when the granting thereof would not cause delay or injury to the plaintiff. They cite Craddock v. Sunshine Bus Lines, 134 Tex. 388, 133 S.W.2d 124 (1939).

Probate proceeding are actions in rem and bind all persons unless set aside in the manner provide by law. TEX. PROB. CODE ANN. sec. 2(e) (Vernon 1980). Mooney v. Harlin, 622 S.W.2d 83 (Tex.1981); Soto v.

Ledesma, 529 S.W.2d 847 (Tex.Civ.App. - Corpus Christi 1975, no writ). See TEX. PROB. CODE ANN. sec 93 (Vernon 1980). Persons interested in an estate are charged with notice of the contents of the probate records. Mooney v. Harlin, supra, Salas v. Mundy, 125 S.W.633 (Tex.Civ.App. 1910, writ ref'd).

Craddock has application to a default judgment case. The case at bar is not such a case. Proper notice has been given. Craddock has no application. Therefore, whether the great weight and preponderance of the evidence established the elements of Craddock is immaterial.

The points of error are overruled.

In another point of error, appellants complain of the court's failure to make findings of fact and conclusions of law on

all ultimate, controlling and material issues. The court made eleven findings of fact and three conclusions of law. Appellants subsequently requested an additional sixteen findings of fact and five conclusions of law, which the court refused to make. Appellants contend that the additional findings and conclusions related to ultimate, controlling and material issues, and the absence of such findings and conclusions deny them a proper presentation on appeal. We disagree.

A trial court may file additional findings of fact and conclusions of law if properly requested; however, it is not required to make findings on evidentiary matters, as opposed to ultimate or controlling issues, or on findings that are in conflict with original findings. City

of Fort Worth v. Bewley, 612 S.W.2d 257 (Tex.Civ.App. - Eastland 1981, writ ref'd n.r.e.); Flagg Realtors, Inc. v. Harvel, 509 S.W.2d 885 (Tex.Civ.App. - Amarillo 1974, writ ref'd n.r.e.). We hold that the requested additional findings and conclusions were either evidentiary, conflicted with the original findings and conclusions, had no supporting evidence or sought findings or conclusions with reference to Craddock which has no application. Accordingly, the trial court's refusal to make the additional findings and conclusions presents no error. State v. Wiergate Lumber Company, Inc., 582 S.W.2d 258 (Tex.Civ.App. - Beaumont 1979, writ ref'd n.r.e.).

This point of error is overruled.

The final point of error challenges an

immaterial finding of fact and is overruled without discussion. We have considered and overruled all points of error.

The judgment of the trial court is affirmed.

RALEIGH BROWN

ASSOCIATE JUSTICE

June 7, 1984

Published. See TEX.R.CIV.P. 452

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Garson R. Jackson, Clerk

September 19, 1984

Mr. Brian E. Cutbirth
Donald L. Anderson, Jr.
Whitten, Haag, Hacker, Hagin & Cutbirth
Post Office Box 208
Abilene, Texas 79604

Mr. Tommy Warford
Turner, Seaberry & Warford
400 Exchange Building
Eastland, Texas 76448

RE: Case No. C-3278

STYLE: IN THE ESTATE OF IRVY OKES ROSS

Dear Counsel:

Today, the Supreme Court of Texas refused the above referenced application for writ of error with the notation, No Reversible Error.

Respectfully yours,

Garson R. Jackson, Clerk

By: _____
Deputy

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Garson R. Jackson, Clerk

October 31, 1984

Mr. Brian E. Cutbirth
Donald L. Anderson, Jr.
Whitten, Haag, Hacker, Hagin & Cutbirth
Post Office Box 208
Abilene, Texas 79604

Mr. Tommy Warford
Turner, Seaberry & Warford
400 Exchange Building
Eastland, Texas 76448

RE: Case No. C-3278

STYLE: IN THE ESTATE OF IRVY OKES ROSS

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

Garson R. Jackson, Clerk

By: _____
Deputy

NO. 30,793

IN THE ESTATE OF IRVY OKES ROSS, DECEASED

91ST DISTRICT COURT OF EASTLAND COUNTY, TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In response to movants' request for findings of fact and conclusions of law, the Court hereby enters the following findings and conclusions:

FINDINGS OF FACT

1. Application to probate will dated June 7, 1983, and for appointment as independent executor, together with the will, were filed July 14, 1983, in the County Court of Eastland County, Texas, by applicant, Edgar Newton Ross.

2. Citation was issued by posting and served and returned.

3. On July 28, 1983, the County Court found as follows:

(a) That every citation required by law had been duly issued, served and returned in the manner and for the length of time required by law.

(b) That the testator was at the time of executing said will at least 21 years of age and was of sound mind.

(c) That the testator deceased July 13, 1983, and was a resident of Eastland County, Texas, at such time.

(d) That the testator executed said will with the formalities and solemnities and under the circumstances required by law to make same a valid will.

(e) That said will had not been

revoked and was entitled to probate.

(f) That applicant was named in said will as independent executor without bond and was entitled to receive letters testamentary upon taking oath required by law.

(g) That there was a necessity for administration on the estate.

(h) That said will was the last will of the testator.

4. On July 28, 1983, the County Court of Eastland County, Texas, admitted the will to probate as the last will of testator of Irvy Okes Ross.

5. Letters testamentary as independent executor were issued to Edgar Newton Ross.

6. On August 19, 1983, movants, Wanda Holmes, Ann Jones and Jackie McGahan filed

their motion asking the County Court to set aside its order and order a new trial; and said movants together with movant Mary Darnell subsequently filed a first amended motion to set aside and for new trial.

7. The cause was subsequently transferred to the 91st District Court of Eastland County, Texas.

8. No misleading statement(s) were made by Edgar Newton Ross to any of movants (or movants' spouses) regarding notification of the probate proceedings.

9. The affidavit of movant Wanda Holmes contains a falsely sworn statement as her testimony revealed she had not seen her father in over three months prior to his death.

10. This Court finds from the evidence produced before it that the testator was of sound mind when he executed the will.

11. This Court finds no evidence to support that the will was executed due to mistake, fraud, duress or undue influence.

CONCLUSIONS OF LAW

1. The judgment of the County Court of Eastland County, Texas, in admitting the will to probate and appointing Edgar Newton Ross as independent executor was correct.

2. The method of citation by posting provided for in Sections 128 and 33 of the Probate Code is constitutional.

3. The evidence is insufficient to support the granting of movants' motion to set aside and for new trial.

Entered on this the 14th day of November, 1983.

Jim R. Wright
Judge of the 91st District
Court of Eastland County,
Texas

NO. 8,938

IN THE ESTATE OF IRVY OKES ROSS, DECEASED

IN THE COUNTY COURT OF EASTLAND COUNTY, TEXAS

ORDER TO TRANSFER

On this the 1st day of September, 1983, came on to be considered Movants' Motion to Transfer in the above cause; and after considering the pleadings on file herein, as well as the applicable law thereto, this Court is of the opinion that said Motion should be in all things granted. It is, therefore,

ORDERED, ADJUDGED AND DECREED that Movants' Motion to Set Aside and for New Trial previously filed in the above probate proceedings be transferred to the 91st District Court of Eastland County, Texas, for hearing, and same is hereby transferred.

SIGNED this the 1st day of September, 1983.

_____
Judge Presiding

IN THE ESTATE OF NO. 8938

IRVY OKES ROSS, IN THE COUNTY COURT

DECEASED EASTLAND COUNTY, TEXAS

ORDER PROBATING WILL AND APPOINTING INDEPENDENT EXECUTOR

This the _____ day of July, 1983, came on to be heard the written application of Edgar Newton Ross, a resident of Hayden Lakes, Idaho, for the probate of a certain instrument in writing, dated the 17th day of June, 1983, and now produced in court, being filed herein with said application on the 14th day of July, 1983, said instrument purporting and alleged to be the last will of Irvy Okes Ross, deceased, which said application is also for letters testamentary as independent executor under Section 145 of the Probate Code of the State of Texas, and due proof being taken in the manner required by law, and it being proved

to the satisfaction of the Court that this Court has jurisdiction and venue of said estate and that every citation required by law has been duly issued, served and returned in the manner and for the length of time required by law; that the testator Irvy Okes Ross was at the time of executing said will at least twenty-one years of age, or over, was of sound mind, and died on the 13th day of July, 1983, in Gorman, Eastland County, Texas; that he had his residence and domiciled in Eastland County, Texas at such time; that such testator executed such will with the formalities and solemnities and under the circumstances required by law to make same a valid will; that said will has not been revoked by said testator and that same is entitled to probate; and it further appearing that the applicant Edgar

Newton Ross was named in said will as independent executor and that he is entitled to letters and is not disqualified from accepting letters; that four years have not elapsed since the death of the said Irvy Okes Ross; that such will provides that no other action shall be had in the County Court in relation to the settlement of such estate other than the probating and recording of such will and the return of an inventory, appraisement and list of claims of such estate, and provides that no bond shall be required of such executor; and that there is a necessity for an administration on such estate.

It is ordered, adjudged and decreed that said will dated June 17, 1983, on file herein be and the same hereby is admitted to probate and record as the last will of the said Irvy Okes Ross, deceased, and that

the said Edgar Newton Ross, applicant herein, receive letters testamentary as independent executor upon taking the oath required by law and that no bond shall be required of or given by him and that when the said Edgar Newton Ross shall have qualified according to law, the Clerk of this Court will issue letters testamentary in accord with this judgment.

Signed this the _____ day of July, 1983.

_____
Scott Bailey
Judge of the County
Court of Eastland
County, Texas

COURT OF APPEALS
Eleventh Supreme Judicial District
Post Office Box 271
Eastland, Texas 76448
(817) 629-2638

June 7, 1984

Mr. Tommy Warford
Turner, Seaberry & Warford
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P.O. Box 311
Eastland, Texas 76448

Mr. Brian Cutbirth
Mr. Donald L. Anderson, Jr.
Whitten, Haag, Hagin & Cutbirth
P.O. Box 208
Abilene, Texas 79604

Re: In the Estate of Irvy Okes Ross, Deceased
No. 11-83-250-CV

Gentlemen:

Please be advised that this Court's former opinion and judgment dated April 26, 1984, has been withdrawn and our opinion and judgment dated June 7, 1984, has been substituted therefor.

We enclosed a copy of the Court's opinion and judgment.

The Court has this same date OVERRULED Appellant's motion for rehearing in this cause.

Please sign and return immediately the enclosed postcard to signify receipt of this letter and a copy of the Court's opinion and judgment.

With kindest wishes, I am,

Yours very truly,

Oleta Moseley, Clerk

OM/ml
Encls. (1) opinion
(2) postcard
(3) judgment

JUDGMENT

In the Estate of Irvy Okes Ross, Deceased	*	June 7, 1984
	*	
	*	
No. 11-83-250-CV	*	
	*	
	*	Our former

opinion and judgment dated April 26, 1984, entered in Volume 7, Page 67, of the Minutes of this Court are withdrawn and held for naught and the opinion and judgment dated June 7, 1984, are substituted therefor.

In the Estate of Irvy Okes Ross, Deceased	*	From the 91st District Court of Eastland County
	*	
No. 11-83-250-CV	*	June 7, 1984
	*	
	*	Opinion by Brown, A.J.

This cause came on to be heard on the record and the same being inspected, it is the opinion of the Court that there was no error in the judgment. It is therefore ordered, adjudged and decreed that the judgment of the trial court be, and the

same is hereby, in all things affirmed, in accordance with this Court's opinion. It is further ordered that the costs incurred by reason of this appeal be, and the same are hereby, taxed against appellants, Wanda Holmes, Ann Jones, Jackie McGahan and Mary Darnell, principals, and The Aetna Casualty and Surety Co., surety on their appeal bond, for which let execution issue, and that this decision be certified below for observance.

Office - Supreme Court
FILED
MAR 15 1985
ALEXANDER L. STE
CLERK

NO. 84-1228

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

IN THE ESTATE OF IRVY OKES ROSS,
Deceased

WANDA HOLMES, ANN JONES, JACKIE McGAHAN
and MARY DARNELL, Petitioners

VS.

EDGAR NEWTON ROSS, Independent Executor
of the Estate of IRVY OKES ROSS,
Deceased, Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS ELEVENTH SUPREME JUDICIAL DISTRICT

Edgar Newton Ross
1855 Stratford Drive
Hayden Lake, Idaho 83835
(208) 772-5296

RESPONDENT

24pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the failure to obtain personal service upon Petitioners (daughters of decedent who were not named as beneficiaries under his will and whose names and addresses are known) in an Application to Probate Will and Appoint Independent Executor violates the due process provision of U.S. Const. Amends. V and XIV, Section 1

2. Whether the statutory notice by posting under Tex. Prob. Code Ann. Section 128(a) (Vernon, 1980) satifies the due process provisions of U. S. Const. Amends. V and XIV, Section 1.

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NO. 84-1288

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

IN THE ESTATE OF IRVY OKES ROSS,
Deceased

WANDA HOLMES, ANN JONES, JACKIE McGAHAN
and MARY DARNELL, Petitioners

VS.

EDGAR NEWTON ROSS, Independent Executor
Estate of IRVY OKES ROSS,
Deceased, Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS ELEVENTH SUPREME JUDICIAL DISTRICT

Respondent Edgar Newton Ross, Independent Executor of the Estate of Irvy Okes Ross, deceased, respectfully prays that Petitioners' Petition for a Writ of Certiorari to review the Judgment and Opinion of the Court of Appeals of Texas, Eleventh Supreme Judicial District, entered June 7, 1984, be denied.

The Opinions Delivered in Courts Below, Jurisdiction of This Court, and Constitutional Provisions and Statutes Involved in the Case are correctly set out in Petitioners' Petition For Writ of Certiorari and, therefore, are not set out herein.

STATEMENT OF THE CASE

This is an appeal from a judgment by the Court of Appeals of Texas, Eleventh Supreme Judicial District, affirming the District Court in overruling a motion for new trial and to set aside an order admitting will to probate and appointing independent executor. The Supreme Court of the State of Texas denied an Application for Writ of Error and overruled a subsequent motion for rehearing in same.

Irvy Okes Ross died on July 13, 1983, following a lengthy illness. While in the hospital Ross executed a will specifically

disinheriting his four daughters (who were not listed by name), Petitioners herein, and leaving everything to his son Edgar Newton Ross, as well as appointing his son independent executor (R Tr 6). The application to probate the will and to appoint independent executor was filed on July 14, 1983 in the County Court of Eastland County, Texas (R Tr 3). Citation was by posting (R Tr 10) at the Eastland County Courthouse as provided by Tex. Prob. Code Ann. Sec. 128(a) (Vernon 1980). None of the daughters resided in Eastland County and two were nonresidents of Texas. No other notice of the application for probate and to appoint independent executor was provided.

The County Court's order probating the will and appointing an independent executor was entered on July 28, 1983 (R Tr 14), after proper proof of the will (R Tr 12). Petitioners timely filed their motion to set aside the order and for a new trial (R Tr 21).

Upon motion of Petitioners (R Tr 45), the case was subsequently transferred to the 91st District Court of Eastland County, Texas, (R Tr 49) where a hearing was held on the motion and witnesses were called to testify (R SF). The motion was overruled by operation of law. The court made certain findings of fact and conclusions of law (R Tr 67). Petitioners requested 16 additional specific findings of fact and 4 additional conclusions of law (R Tr 70) which the court did not make. Petitioners appealed the overruling of their motion to set aside and for new trial.

Petitioners raised the issue relating to the failure to give personal notice to them and the constitutionality of such lack of personal notice in their motion for new trial and in the points of error alleged in their appeal to the Court of Appeals and the Texas Supreme Court. Their claim was denied. (see pages 12-15 of Statement of The Case in

Petitioners' Petition For Writ of Certiorari).

Petitioners seek by Writ of Certiorari review by the U. S. Supreme Court of the decision rendered in the Court of Appeals and affirmed by the Supreme Court of Texas pursuant to 28 U.S.C. § 1257 (3) of their right to due process provided in U.S. Constitution Amendments V and XIV Section 1.

Respondent would mention that there are several factual inaccuracies stated in the Statement of the Case set forth in Petitioners' petition. In regard to those factual inaccuracies relevant to the issue presented Respondent would point out the following:

(1). Finding of fact no. 8 made by the District Court (R Tr) found no misleading statements were made by Respondent to any of Petitioners (or Petitioners' spouses) regarding notification of the probate proceedings (contra to Statement of Facts pages 10,11 of Petitioners' Petition).

(2). Requested finding of fact no. 15 (discussed on page 15 of Fact Statement of Petitioners' Petition) was not made by the District Court undoubtedly because the testimony of Petitioners Wanda Holmes and Mary Darnell at the hearing on the motion to set aside indicated they were not certain whether they knew of the application to probate prior to or after the date of the hearing on the application (R SF 20-22,32).

(3). No prior will of the decedent leaving all of his estate equally to Petitioners and Respondent was admitted into evidence. A copy of an unexecuted prior will was offered into evidence, but was not admitted by the District Court (R SF 13,14).

(The abbreviations R Tr and R SF refer to the transcript portion of the record and the statement of facts portion of the record, respectively).

ARGUMENT AND AUTHORITIES FOR DENYING THE PETITION

Since both questions presented for review are analogous to each other they will be combined for the purpose of argument.

Petitioners contend that the failure to obtain personal service upon them violated the due process provision of U. S. Const. Amends. V and XIV, Section 1. They urge that statutory notice by posting under Tex.Prob. Code Ann.Secs.128(a),33(f)(2) does not satisfy the due process requirements in circumstances where the names and addresses of interested parties are known or available. Petitioners rely on the case of Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L. Ed 865,873 (1949) in which this Court stated:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested

parties of the pendency of the action and afford them an opportunity to present their objections....The notice must be of such nature as reasonably to convey the required information,...and it must afford a reasonable time for those interested to make their appearance. (Citations omitted) (Emphasis ours and Court of Appeals).

The opinion of the Texas Court of Appeals on this point is as follows:

"We recognize that various federal and Texas Courts have upheld this argument based upon the reasoning in Mullane, supra. Armstrong V. Manzo, 380 U.S. 545, 85 S.Ct.1187, 14 L.Ed. 2d 62 (1965); City of Houston v. Fore, 412 S.W.2d 36 (Tex.1967); City of Waco v. Roddey, 613 S.W.2d 360 (Tex.Civ.App. - Waco 1981, writ dism'd); Jones v. City of Odessa, 574 S.W.2d 850 (Tex.Civ.App. - El Paso 1978, writ ref'd n.r.e.); City of Houston v. Parkinson, 419 S.W.2d 900 (Tex.Civ.App. - Houston (1st Dist. 1967, writ ref'd n.r.e.). None of these cases, however, involved probate matters. Texas courts hold that posting notice of the application for probate, when a will has been produced for the court, is sufficient without giving personal notice. Ladehoff v. Ladehoff, 436 S.W.2d 334 (Tex. 1968); Nass v. Nass, 228 S.W.2d 130 (Tex.1950); Soto v. Ledezma, 529 S.W.2d 847 (Tex.Civ. App. - Corpus Christi 1975, no writ); Fortinberry v. Fortinberry, 326 S.W.2d 717 (Tex.Civ.App. - Waco 1959, writ ref'd

> n.r.e.). The order admitting the will to probate is not such a final determination of its validity as to deny appellants a remedy. Even though the burden of proof shifts to appellants, they may contest the validity of the probated will by initiating a proceeding under TEX. PROB. CODE ANN. Sec. 93 (Vernon 1980). We hold that appellee's failure to obtain personal service upon appellants does not violate the due process provisions of the federal constitution."

The above opinion of the Texas Court of Appeals emphasizes the language "in any opinion which is to be accorded finality". Petitioners contend that the Court of Appeals is erroneously saying that the subject order of the probate court admitting the will to probate and appointing an independent executor is not a final judgment. Such contention is incorrect. The Court of Appeals is saying that such an order is not a final determination of its validity as to deny petitioners a remedy (emphasis ours), and that Petitioners may contest the validity of the probated will by instituting a proceeding under Tex. Prob. Code Ann.Sec.93. Petitioners further contend that the

decision of Armstrong v. Manzo, 380 U.S.545 (1965) is analogous to the present case. As noted, Armstrong is not a probate proceeding. Also, the remedy afforded Petitioners under Section 93 is different from the remedy (motion for new trial hearing to contest the judgment) provided in Armstrong. Such remedy under Section 93 is a new and independent proceeding.

Respondent would cite the following decisions of this court which have considered probate notice provisions similar to the Texas provisions and found them to be constitutional:

(1). Case of Broderick's Will 88 U.S. (21 Wall) 503 (1874). This was a suit by heirs at law to set aside the probate of a will alleged to be a forgery and involving a California statute that provided for notice by publication or posting with a one year period to contest the probate. Justice Bradley noted that the succession to a

deceased person's estate is in the nature of a proceeding in rem, in which all persons in the world who have any interest are deemed parties; that the public interest requires that estates of deceased persons, being deprived of a master and subject to all manner of claims, should at once evolve to a new and competent ownership; that there should be some convenient jurisdiction and made of proceeding by which this devolution may be perfected with the least chance of injustice and fraud; and that the result obtained should be firm and perpetual. After reviewing the California statute, Justice Bradley stated:

> "In view of these provisions, it is difficult to conceive of a more complete and effective probate jurisdiction, or one better calculated to attain the ends of justice and truth."

(2). Farrell v. O'Brien 199 US 89 (1905). This case involved heirs at law seeking to set aside a nuncupative will and a Washington statute which provided for no notice, but a

one year period during which a will could be contested. Justice White stated:

> "The contention made on this subject amounts to asserting that every state law which provides for probate of a common form is repugnant to the due process clause of the constitution even though under state statutes full and adequate remedies are provided by which interested parties during a period of time prescribed by law, be heard in the probate proceedings to ascertain the existence of a will or its probate."

(3). Culbertson v. H. Witbeck Co. 127 US 326 (1888). In this case the court approved notice by publication noting that unless the necessary parties in such cases could be brought before the court by publication there would be in many cases an impossibility of doing it at all.

(4). Robertson v. Pickrell 109 US 608 (1883). A Virginia statute allowing probate immediately upon filing of proof and providing for a seven year period to contest in chancery by any interested persons was held to be constitutional.

(5). Goodrich v. Ferris 214 US 71 (1909). A California statute providing for 10 days statutory notice of the time appointed for the settlement of the final account and upon action for final distribution was found to be constitutional and not wanting in due process.

(6). Christianson v. King County 239 US 356 (1915).

(7). Michigan Trust Co. v. Ferry 228 US 346 (1913).

Respondent would emphasize (as noted in several of the above cited cases) that probate is an in rem proceeding directed against property rather than persons. Its purpose is to determine the interests of all persons, know or unknown, in the res, and a valid judgment in rem is considered binding on the whole world. The Texas Court of Appeals in its opinion noted as follows:

> "Probate proceedings are actions in rem and bind all persons unless set aside in the manner provided by

law. TEX. PROB. CODE ANN. Sec. 2(e) (Vernon 1980), Mooney v. Harlin, 622 S.W.2d 83 (Tex.,1981), Soto v. Ledezma, 529 S.W.2d 847 (Tex.Civ.App.-Corpus Christi, 1975, no writ). See TEX. PROB. CODE ANN. Sec. 93 (Vernon, 1980). Persons interested in an estate are charged with notice of the contents of the probate records. Mooney v. Harlin, Supra; Salas v. Mundy 125 S.W.633 (Tex.Civ.App. 1910, writ ref'd.)"

The Court in Mullane stated that distinctions between actions in rem and those in personam were useful in many branches of the law in determining the power of the State to resort to constructive service and emphasized that its holding was confined only to that particular proceeding (notice of judicial settlement of accounts required by the New York Banking Law). In Mullane the interested parties had an actual vested interest in accounts. In our present case the Petitioners never had an interest in the decedent's estate as they were not named as beneficiaries in his will.

Another argument against the use of

Mullane in probate can be made from the course of development of American probate law from its English heritage. Probate jurisdiction in early England was in ecclesiastical courts with no notice being given of the probate of a will; however, English law did provide a period in which interested parties could come in and contest the probate. Some states still adhere to this basic no notice system, and other states have modified the system to at least provide for statutory notice by publication, prior to the probate of the will. Thus, the system of notice by publication or posting has always been part of our probate system. Page, The Law of Wills, Revised Treatise, Vol. 8, pages 23,26,86,87.

The statutory notice by posting under Tex. Prob. Code Ann. Section 128(a) of the application to probate a will and appoint executor satisfies the due process provision of U. S. Court. Amends. V and XIV, Section 1.

There is no question but that the statutory requirements have been fully complied with and there is no finding of any type of fraud or other illegality on the part of the Respondent. Petitioners knew of decedent's death and the fact that they did not reside in the county of probate and know of the posting of the notice is their only excuse offered. Justice Bradley writing of the analogous circumatences in the Case of Broderick's Will noted that if such an excuse could prevail it would unsettle all proceedings in rem. The failure to obtain personal service upon Petitioners did not constitute a violation of due process.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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RESPONDENT

March, 1985

CERTIFICATE OF SERVICE

I do hereby certify that three copies of the foregoing Respondent's Brief In Opposition To Petitioners' Petition For A Writ of Certiorari To The Court Of Appeals of Texas Eleventh Supreme Judicial District were forwarded to Brian E. Cutbirth of Whitten, Haag, Hacker, Hagin & Cutbirth, P. O. Box 208, Abilene, Texas 79604, by certified mail, return receipt requested, on this the 13th day of March, 1985.

Tommy Warford

Tommy Warford